No. 11,807

IN THE

United States Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

FRANK ROWLEY,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

The statement of jurisdiction is properly set forth in brief for appellant (p. 1).

GENERAL STATEMENT AS TO SCOPE OF APPELLEE'S BRIEF.

At the outset of the trial, counsel for appellant offered to stipulate that the case be tried before the Court (T.R. 26). Counsel for appellee, after procuring time to consult with his client, concurred with counsel for appellant and with the consent of the Court, the parties stipulated as outlined in brief for appellant, at page 3 thereof.

This brief is chiefly concerned with the question of damages, hence, in the main, in the following statement of evidence, the evidence is stated that bears on that subject.

It must be borne in mind that the same judge heard the criminal case, No. 11,545, with jury, as heard the civil case, No. 11,807, without jury, and that the criminal case was tried beginning November 5, 1946 and the civil case began shortly thereafter, namely, on December 9, 1946.

APPELLEE'S STATEMENT OF EVIDENCE.

Appellee suffered a compound, comminuted, depressed fracture of the skull (T.R. 31). He was treated for the fractures, laceration of the brain, laceration of the dura, hemorrhage, shock, laceration of the scalp (T.R. 31). Brain tissue was destroyed and exuded from the wound (T.R. 32, 79). There were a considerable number of small fragments of bone removed from Mr. Rowley's brain (T.R. 32-33). About two-thirds of one ounce by volume of destroyed brain tissue was removed (T.R. 33). Some bone fragments were replaced on top of the dura after cleaning in the hope that they would grow over the defect in the man's skull; some were thrown away (T.R. 33). The length of the wound or laceration was 3¼ to 3½ inches long (Crim. T.R. 296, 301; T.R. 72, 79).

A great many fragments lay in the brain substance itself, completely through the dura and in the brain substance. The deepest fragment removed from Row-

ley's brain was one and one-quarter inch below the outer table of bone—one and one-quarter inch below the outside of the skull (T.R. 33).

There is an area between the size of a quarter and the size of a fifty cent piece of Rowley's brain that is uncovered by bone (T.R. 38, 85, 86).

The injury was on the right side of the brain in the front parietal area rather close to the motor area (T.R. 33, 39, 44, 58) and covering the frontal lobe (T.R. 47). There was a fracture in the frontal sinus. The fracture ran from the frontal area to the posterior. There was a stellate fracture radiating at different points in addition to the compound, comminuted, depressed fracture at the site of the application of the force (T.R. 93).

At the time of the trial Rowley complained to his doctor of dizziness, headache, ringing in his ears, a sensation of staggering or giddiness, inability to concentrate without a headache, inability to function mathematically almost totally at times, increased fatigability as far as work is concerned (T.R. 41). All these symptoms were unsolicited (T.R. 48). He also complained to his doctor at the time of the trial of nervousness and insomnia (T.R. 48). His headaches were frequent and he said to Doctor Romig that he has never been more than two days free from headache (T.R. 48). Doctor Romig noticed that Rowley's mental capacities had been dulled (T.R. 41); so did Rowley (T.R. 117); his friend Robert Risley stated that he does not seem to be the same since the injury (T.R. 137); so did his friend A. H. Dyer who

testified he was not as alert or as quick and his mind seems preoccupied and he didn't pay the proper attention to traffic (T.R. 138); so did his wife, Vena Rowley, who testified that he responds more slowly when spoken to, takes longer thinking, seems to be hard of hearing—he just seems slower and harder to draw his attention (T.R. 139).

Dr. Romig stated:

Based upon my diagnosis and study of the text you have mentioned, and my experience as a surgeon and physician, my prognosis in this particular case of Mr. Rowley is unfavorable. I mean that Mr. Rowley may have no end to his headaches, to his dizziness, to the ringing in his ears, to his nervousness, to his fatigability, and his nightmares and insomnia. He may have no end to these. They may, in fact, become worse. Not only could he have those complications, but epilepsy, for example, could ensue. Wechsler's Textbook places that at five and ten per cent up to thirty in severe injuries. By that I mean that the outcome of epilepsy depends in large measure upon the amount of brain tissue destroyed and the proximity of the damaged brain tissue to the motor centers. By Wechsler placing it at 10 to 30 per cent, they estimate that a man with a severe head injury has about a 10% chance of becoming a confirmed epileptic, and in some types of injury, but not specifically the one involved, it is even known to be higher. Not only could he have that as a complication, but he could have, even at a late date, meningitis—inasmuch as it communicates with the sinus, he could even have

a brain abscess. Mr. Rowley's condition is no better, in fact, since he left the hospital. It is also possible that Mr. Rowley could go through the remainder of his life without any epilepsy. When I speak of prognosis of epilepsy, and these various disorders I have described, I do not mean it is going to happen, but in my opinion Mr. Rowley will never be free of some measure of his present discomfort. Those discomforts that he suffers now are headaches, dizziness, ringing in the ears, nervousness, fatigability, sleeplessness, and he has the one positive finding of diminished cerebration. Mr. Rowley is not mentally as capable now as I have known him before. I would say I have known him eight years (T.R. 45-46).

The lesion in this injury occurred in the frontal area, rather close to the motor cortex. That is back close to the mid portion of the brain. It roughly covers the frontal lobe. When they said the death rate is high in lesions in the neighborhood of the medulla and frontal lobes, they mean the same frontal lobes I am now speaking of. While the medulla and frontal lobes are separated considerably, lesions in that area, according to the text, are worse than other areas of the skull. I did point out the fracture in the frontal sinus to the judge; that is the same frontal sinus that they refer to here when they say that "fracture through the frontal sinus may result in late meningitis". There was a fracture of the vault of the skull. The fracture ran all the way from the frontal area to the posterior. He had a compound, comminuted, depressed fracture of the skull. Also he

had linear fracture reaching from the front of his skull to the back of his skull (T.R. 47-48).

In other words, according to these percentage figures, considering Mr. Rowley's injury, he has a great likelihood of never ever being free of any one of these miserable symptoms. He has at the present time headache, dizziness, ringing of the ears, nervousness, fatigability, and insomnia (T.R. 48).

I mean Mr. Rowley cannot hold a job in my opinion. I do not know that he will ever be able to hold a job. However, I would not be surprised if he could. The outlook as far as that is concerned is rather indefinite (T.R. 49).

I expect Mr. Rowley to be in the hands of a physician for a long time on account of his present difficulty. By a long time I mean—well, it is indefinite, but I would say no man with this significant head injury could ever hope to escape a doctor's care for years and years (T.R. 50).

The three doctors, Walkowski, Coffin and Davis, were appointed by the Court the day before their testimony was given, to observe Rowley (T.R. 58). They corroborated Romig's testimony in the main. Dr. Romig treated Rowley from the day of the injury until the trial (T.R. 31; Crim. T.R. 302).

Dr. Walkowski stated there may be a possibility of epilepsy (T.R. 60); that there was a possibility of air entering the cranial vault, possibly resulting in infection, compression of the brain and even cause death (T.R. 61). Dr. Walkowski corroborated Dr. Romig's

testimony as to the extent of the fracture and as to the fracture into the frontal sinus (T.R. 62). He corroborated Romig's statement that Rowley's arithmetic and mental processes were retarded and confused (T.R. 62); stated that personality changes could result and that another operation might be necessary if the present symptoms persist, and they might not stop a year from now (T.R. 62, 63).

Dr. Coffin's diagnosis, after examining Rowley upon Court order, was a post-traumatic fracture of the skull and laceration of the brain tissue with residual symptoms consisting of hypertension, high blood pressure and an impairment of mental and physical efficiency. The prognosis as to life is good, but prognosis as to full recovery of complete mental, emotional and physical efficiency would be rather poor. He recommended irregular work at Rowley's discretion and further specialized medical treatment (T.R. 72, 73). His symptoms might continue ten years and might become aggravated and more persistent. His injury could result in personality change (T.R. 73). There is possibility of epileptic form of seizures if the wound healed improperly (T.R. 75). His symptoms might become worse (T.R. 76).

Dr. Davis in the main corroborated the findings of the other doctors as to subjective symptoms of headaches, ringing of the ears, dizziness. Dr. Davis is deaf (Crim. T.R. 367). Dr. Davis was a witness for the defendant at the criminal trial (Crim. T.R. 367) and had been asked to care for Rowley at the request of Eagleston on the day of the injury (Crim. T.R.

378). Dr. Davis stated that Rowley's brain injury was severe (T.R. 90); that Rowley's symptoms of headache and vertigo might continue for an indefinite period (T.R. 103); he might have petit mal (T.R. 100).

At the time of the injury and for a year and one-half prior thereto, as electric motor repairman, appellee earned approximately $400.00 per month (T.R. 113). During the war appellee earned $450.00 per month as electric motor repairman for the Army.

It was shown that Rowley's age was 41 (T.R. 107) and his life expectancy was 27½ years; that the present value of an annuity that would bring Rowley $400.00 per month for the rest of his life based on the life expectancy and annuity tables was $122,892; $300.00 a month, $92,169; $200.00 a month, $61,446; and $100.00 a month, $30,723 (T.R. 134, 135).

The doctors agreed that the brain injury suffered by Rowley was extremely severe (T.R. 50, 62, 90).

Rowley testified it hurt his head to concentrate and that he couldn't concentrate; that he had trouble sleeping and had bad dreams (T.R. 117); that he suffered much pain at the time of the injury and since (T.R. 120); that the future worries him to a certain extent (T.R. 121).

"I have suffered much pain at the time of this injury and since. The first two or three days in the hospital, I do not remember a whole lot what took place. There is a few instances that I do remember

but I—I do not remember but very little the first three or four days, and then I seemed to gradually get better, but my head hurt and mostly—well, it hurt until I got out of the hospital, and then it hurt mostly when I tried to do any thinking or anything. I couldn't do very much thinking. It was best to relax. I always felt better when I really fully relaxed, because when I get in a strain or try to think, why, I get severe headache, and that hurts." (T.R. 120, 121).

Rowley was hospitalized 29 days (T.R. 115-116). He did very little work since getting out of the hospital (T.R. 116). I can't do any lifting—I have—that is absolutely—I have tried to do so, but I can't do it, that is all (T.R. 116). He doesn't think he can climb telephone poles and doesn't want to try (T.R. 116). He feels off balance at times (T.R. 117). Dr. Romig corroborates this; he feels he is going to stagger . . . if you feel that unsteady you do not walk well (T.R. 54). I don't feel like I could go back to my regular work at the Post, because I could not do any lifting, and I do not believe I could stand eight hours standing up to a bench working. I don't believe I could anyways near stand it (T.R. 117).

Rowley earned nothing from the date of the injury until time of trial (T.R. 118). Since this injury I have not been able to do as much work as I did in my spare time prior to the injury (T.R. 118).

Rowley's work in life is that of a shop electrician (T.R. 124); this work requires prior knowledge and experience, the exercise of judgment and discretion

and the use of various types of meters and the calculations that go with them (T.R. 125).

If Rowley gets over tired his head aches at the point of injury (T.R. 116). When he gets tired he lies down and rests. He does this for his headaches (T.R. 116, 117).

There is scar tissue over Rowley's brain (T.R. 43, 50, 53, 62, 74).

The area of Rowley's skull that was denuded of bone was not covered at the time of the trial (T.R. 52); it is doubtful whether the replaced bone tissue will grow and ever cover the denuded area (T.R. 51, 52). Dr. Romig believed it to be impossible (T.R. 52). Dr. Davis stated that when he palpated Rowley's scar it seemed firm except in an area just above the region of the hair line which had less resistance than the posterior part of the scar and the anterior part of the scar. When I pressed upon this he gave evidence of—not—of desiring that I should not press on it—he said that caused pain (T.R. 82-83).

All doctors believed Rowley was not a malingerer (T.R. 50, 55, 63, 74, 93).

Dr. Walkowski testified that in some cases personality changes evolved from operations on the frontal lobe of the brain (T.R. 70). So did Dr. Coffin (T.R. 73).

ARGUMENT.

FIRST POINT RAISED.

WHEN THE TRIAL COURT CONSIDERED EXCERPTS FROM A MEDICAL TEXTBOOK AS PART OF APPELLEE'S CASE AND RELIED THEREON IN PART IN MAKING ITS FINDINGS, CONCLUSIONS, AND JUDGMENT, ERROR, IF ANY, WAS ABSENT BECAUSE APPELLANT EXPRESSLY CONSENTED TO THIS PRACTICE, AND MOREOVER SUCH EVIDENCE WAS CUMULATIVE.

1. The two attorneys for appellant not only failed to object properly to this testimony but expressly, clearly, affirmatively and unequivocally consented to the trial Court considering the text in question, namely Wechsler's Textbook of Neurology.

2. The trial Court did not admit into evidence pages 534 to 540, inclusive, sub-titled "Fracture of the Skull" of "A Textbook of Clinical Neurology, with an Introduction on the History of Neurology", by Israel S. Wechsler, M.D., Fifth Edition, Revised, 1944, W. B. Saunders Company.

During the course of the trial the following occurred (Transcript of Proceedings, pages 31, 32 and 33):

"Q. Now Doctor, based upon your diagnosis consisting of symptoms and findings, what is your prognosis—first defining that term for the benefit of the Court and myself?

A. The prognosis is to be called the outlook in Mr. Rowley's case, what he can expect and how comfortable he will be or how uncomfortable he will be.

Q. Now, is your prognosis, based—in addition to being based upon your diagnosis, is it based upon the study of any particular medical authority?

A. Yes, it is in some measure based on my recent study of Wechsler's Textbook of Neurology.

Q. Who publishes that text?

A. I don't know.

Q. I will hand you Wechsler's Textbook of Clinical Neurology and will you identify it? Tell me who published it, and when?

A. This is a 1944 edition of Wechsler's Textbook of Neurology published by W. B. Saunders and Company.

Q. Is your prognosis based upon the study of any additional text?

A. Yes, it is.

Q. What is that text?

A. Gray's Text—Attorneys Textbook of Medicine by Gray.

Q. What edition?

A. This is a 1940 edition, published by Matthew Bender and Company.

Mr. Hellenthal: I now offer in evidence, subject to removal of pertinent extracts, these two texts. (Handed them to Mr. Grigsby.) Does counsel for the defendant have any objection?

Mr. Grigsby: We object to them as exhibits, your Honor, because, as I remember the rule, textbooks are inadmissible. But we have no objection to the Court consulting any work that he desires—researches on this case. As exhibits we object to them.

Mr. Hellenthal: I introduced them qualifiedly as exhibits and I will withdraw the offer to introduce the entire text and accede to Mr. Grigsby's state-

ment that—I merely offer them for the consideration of the doctor and the Court.

Court: Very well, I understand the proffer is withdrawn and that counsel for the defense have no objection to the Court considering these texts.

Mr. Grigsby: Nor any other texts."

The above quoted matter did not appear in the Bill of Exceptions served upon counsel for appellee and was entirely omitted therefrom. Prior to settling the Bill of Exceptions, the following was included in a paper served upon counsel for appellant, entitled "Plaintiff's Proposed Amendments to Proposed Bill of Exceptions", which was filed with the District Court, Third Division, Territory of Alaska, on 3 September, 1947, and agreed to by counsel for appellant and inserted in the Bill of Exceptions at page 16, line 11, of the typewritten copy thereof:

> "Whereupon counsel for defendant, George B. Grigsby, indicated that the defense had no objection to the Court considering Wechsler's and Gray's texts, nor any other texts."

It thus clearly appears that appellant consented to the trial Court "considering" the Wechsler's text and to allowing Dr. Romig to refer to and quote this text in his testimony.

In the Assignment of Errors, no specific mention is made of the trial Court's considering Wechsler's text (T.R. 15, 16, 17, 18); nor is specific mention made of this alleged error in the Exceptions (T.R. 12, 13).

3. *The express waiver of objection to the Court's consideration of matters which would be inadmissible as evidence precludes appellant from objecting on appeal.*

a. 53 *American Jurisprudence,* par. 143, page 127:

> "If when inadmissible evidence is offered the party against whom such evidence is offered consents to its introduction, or fails to object, or to insist upon a ruling on an objection to the introduction of such evidence, and otherwise fails to raise the question as to its admissibility, he is considered to have waived whatever objection he may have had thereto, and the evidence is in the record for consideration the same as other evidence."

b. *Diaz v. United States,* 223 U. S. 442. The syllabus of this case states:

> "When evidence taken elsewhere is admitted generally and without restriction by consent of the accused, it is not subject to the objection that it is hearsay."

At page 450 of the *Diaz* case, supra, the Court states:

> "True, the testimony could not have been admitted without the consent of the accused, first, because it was within the rule against hearsay and, second, because the accused was entitled to meet the witnesses face to face. But it was not admitted without his consent, but at his request, for it was he who offered it in evidence. So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted

without objection it is to be considered and given its natural probative effect as if it were in law admissible."

c. *Thompson v. Thompson,* 91 Ala. 591, 8 So. 419, 11 L.R.A. 443. The syllabus of this case, as stated in 11 L.R.A. 443, states:

"An agreement that certain papers may be read in evidence is a consent that they shall be considered as legal evidence in the case."

d. *American Petroleum Co. v. Missouri Pac. Ry. Co.,* 25 F. (2d) 441. The syllabus of this case states:

"Stipulation of parties that either party might produce witnesses who could testify to statements taken from their books and records, and that statements might be introduced in evidence, precluded objection to statements introduced on grounds of incompetency or as not best evidence attainable."

e. *Missouri K. & T. Ry. Co. v. Elliott et al.,* 102 Federal Reporter 96; (affirmed U. S. Sup. Ct., 184 U. S. 695), particularly at pages 105 and 106. The Court states at page 106:

"The admission of incompetent evidence of a material fact is an error without prejudice, where the fact is proved by other competent evidence (Cooper v. Coates, 21 Wall. 105, 22 L. Ed. 481), or the party complaining of the error was instrumental in excluding competent evidence to prove the fact (see authorities supra), or where the fact is one of common knowledge."

f. 64 *Corpus Juris,* at page 167, Section 189 (2), states:

> "Where a party consents to the admission of evidence, he cannot thereafter object to its competency, since he will not be permitted to take inconsistent positions."

g. Ford on Evidence, New York, 1935 Edition, published by Matthew Bender & Company, Inc., Volume 4, page 2703, states:

> "Sec. 530. *Waiver*—Parties may waive the rules established by the courts for the admission of evidence. 'Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory and even constitutional rights * * * (Matter of New York, Lackawanna, etc., R. R. Co., 98 N. Y. 447; * * *)' "

h. See also, *New York Elevated Railroad Company v. Fifth National Bank,* 135 U. S. 432;

Wallerich v. Smith et al., 66 N. W. 184, 97 Iowa 308;

State v. Gee Jon, 211 Pac. 676, at page 679; 30 A.L.R. 1443, at page 1447;

Hinkle v. James Smith & Son, 65 S. E. 427, 133 Ga. 255.

4. Had the appellant's counsel not consented to the Court considering this text, extracts therefrom would not have been used by appellee's counsel for any purpose.

5. Doctor Romig's opinion as to the prognosis of this injury was not based upon Wechsler's text alone but "based upon my diagnosis and study of the text you have mentioned, and my experience as a surgeon and physician" (T.R. 45, lines 9-12, inc.). To the same effect, "My prognosis in addition to being based upon my diagnosis, is in some measure based upon my recent study of Wechsler's Textbook of Neurology" (T.R. 44, lines 24-27, inc.). From a reading of the entire testimony of Doctor Romig, as distinguished from statements lifted from the context for a devious purpose, it is apparent that Doctor Romig merely used some of Wechsler's language to express his own opinion. The evidence of the other doctors, moreover, in itself supports the judgment of the trial Court. (See Appellee's Statement of Evidence.)

6. Assuming that the medical text was improperly referred to, despite the consent of appellant, the trial Court was not unduly influenced thereby, and other matter in the case strongly supports the trial Court's decision. This is particularly true in a civil case, especially one tried by a Court alone without jury.

SECOND POINT RAISED.

THE ADMISSION OF THE TESTIMONY OF THE WITNESS DAUGHERTY AS TO HIS OPINION AS TO APPELLEE'S ABILITY TO OBTAIN LIFE INSURANCE IN THE FUTURE WAS NOT PREJUDICIAL ERROR.

7. Appellant in his brief states that "undoubtedly the Court relied on this testimony in making his de-

cision herein as he specifically refers to the life insurance data in his findings (T.R. 10)." This is an erroneous conclusion as the trial Court in his findings refer only to the Mortality Tables or Exhibit 128 (T.R. 9, 10). There is nothing in the record to indicate that the trial Court even considered this testimony.

8. The cases cited by appellant to support the contention that Daugherty's testimony was inadmissible are all cases where the issue was that of the materiality of a misrepresentation contained in an insurance policy or whether an undisclosed fact was material to an insurance risk. All cases cited by appellant are found in 135 A.L.R. 411 in an annotation entitled "Opinion or expert testimony as to materiality of misrepresentation in application for insurance or as to increase of risk or as to practice or usage of insurance companies regarding acceptance or rejection of certain class of risk."

In *Penn. Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co.,* 72 Fed. 413, cited by appellant, Taft J. stated at page 423:

> "The question of evidence thus presented has been before the courts of England and America in many different phases and the decisions present a bewildering conflict of authority."

Taft adds later, at page 428 as the reason for the rule of exclusion, adopted by one line of decisions, the following:

> "* * * it is difficult to see why an insurance examiner should be permitted to influence the

jury by giving his sworn opinion *on the very issue* which they are assembled to try, and of which they are presumed to have the same opportunities upon which to found a reliable judgment as he." (Italics supplied.)

Appellee submits that since there is a conflict of reputable authority on the question of admissibility of this evidence where the very issue of the case is involved, that no error was committed in accepting such testimony in this case when it did not affect the issues of this case in any way. Appellant stated Daugherty's testimony was "immaterial" in his objection (T.R. 136).

9. Assuming that Daugherty's testimony was inadmissible, it did not and could not have affected the trial Court's decision. The ability or inability to obtain life insurance because of appellee's injuries would not affect the measure of damages; assuming that it could have, there was still abundant evidence to support the damages awarded.

THIRD POINT RAISED.

THE DAMAGES AWARDED WERE NOT EXCESSIVE.

10. *McDonald v. Standard Gas Engine Co., et al.*, 47 P. (2d) 777, District Court of Appeal, First District, Div. 2, California, 1935; rehearing denied by Cal. Sup. Ct. in 1935, is a case strikingly similar to this case. In the *McDonald* case, a verdict for $100,000.00 was awarded plaintiff for personal injuries sus-

tained when a pulley in an iron factory exploded and fragments therefrom struck plaintiff. The injuries were strikingly similar. We quote at length from the opinion:

> "It is earnestly asserted that the verdict was excessive and for that reason the judgment should be reversed. The verdict was in the sum of $100,000, and it will be conceded at once that that is a very high figure. It is equally clear that the injuries suffered were appalling. After the accident the plaintiff was taken at once to Highland Hospital. Dr. Schwartz, the assistant superintendent, was at the hospital when the patient arrived. He testified: 'The patient arrived deeply unconscious and in a state of profound shock. There was a large area of the scalp torn loose, appeared to be about half scalped, over the left frontal region. A large strip of the scalp cap had been torn away, leaving an opening about the size of a saucer. The dura mater, which is the covering of the brain, had been torn in two, thus exposing the brain. Large quantities of macerated brain tissue were exuding from the hole in the skull cap. His clothes were spattered with bits of brain tissue. I noticed on his left shoulder a big gob about the size of an English walnut. The wound was contaminated. It looked like streaks of grease or oil, bits of pulverized bone. * * * That was a compound comminuted fracture of the skull, and brain was exuding, and brain was spattered all over the outside.' Dr. Allen, chief of staff of the hospital on brain injuries, gave similar testimony, but stated that the hole broken in the skull cap measured two and one-half by two inches. Continuing, Dr. Al-

len stated: 'He also had a contused wound on the left elbow which indicated a fracture of that elbow. * * * There was a large cut on his neck, his throat was cut. He had a lesion which made the left eye appear crossed. * * * There are several nerves in the brain, twelve on each side, that supply various structures about the head and the muscles that make our eyes move from side to side or up and down and are controlled by some of those nerves. One in particular called the sixth cranial nerve is the one that makes our eyes turn to the left and to the right. This particular nerve had been injured and he could not move his eye. There was one other nerve injured in his face, the seventh nerve. That nerve supplies the muscles of expression on the side of the face so that he was unable to wrinkle the face in the normal manner. There was another result much more serious, and that is what is known as aphasia. He was unable for many weeks after this accident to talk coherently, or to even make known his wishes. He understood our language but was unable for at least two or three weeks to express himself and that was due to a particular lesion of the left side of the brain. That in my opinion was the most serious injury sustained.' He received apparently the best medical attention and hospitalization. While yet unconscious the patient was taken to the operating room, the wound in the skull was thoroughly cleansed, the dura mater was sewed up, the scalp was drawn over it and sewed up. In this form the skull wound was healed. The cranial nerves were in part grafted, and much relief was given to the patient enabling him to more nearly con-

trol his left eye. The wound on the throat was satisfactorily treated and so was the broken elbow. At the time of the trial the patient had regained the power to talk, not fluently, but there had been some restoration of that function. The sixth cranial nerve could not be restored. The function of the nerve controlling facial expression appeared to be fully restored. The hole that had been broken in the skull remained, but the dura mater and the scalp were in place over the depression. The injury to the left eye had become less, but at the time of the trial there was some loss of vision in that eye. Testifying as to the then condition of the left eye, Dr. O'Connor said: 'He can see singly and not double and see straight ahead. Before we did the first operation there was motion upward about fifteen degrees from the straight position. We gained about ten degrees on that. If he is left in his present condition he can never turn his eye upward any more than at present. I have done all for him I expect to do.' Dr. Fleming testified: 'I examined Mr. McDonald at our office yesterday afternoon. * * * He has a defect in the left frontal temple region that measures five centimeters by six. When you palpate this depression you can feel the brain substance underneath and when he coughs there is a very marked protrusion of the brain substance and along the frontal region there is a tenderness. He has a scar up there over his eye and ear. That resulted from the removal of the bone at the time of his injury. Defect is referable to the left eye. The left pupil is smaller than the right, and the left pupil does not react as well as the

right. He cannot look to the left nor apparently upward, because the injury to the sixth nerve is so great and also the third. When he looks far to the left he sees double and if he looks upward he does the same. He had a very definite injury at the side of his neck, a lacerated wound that has caused a scar. He has some difficulty in opening his mouth fully because of the temporal muscle that has become adhered to the bone. At first he was unable to open his mouth at all but because of constant exercises he is now able to open it about two-thirds of normal. That is due to a restricted muscle on the left side of the head. He has a scar on the left elbow and limitation of movement of the left elbow and left arm and hand, a trifle weaker than the right.'

"Speaking of the future treatment of the case, Dr. Fleming testified: 'The contemplated operation is one to fill in a defect in the left frontal region. He has a depression there and from a cosmetic point of view it would be important to correct that, but the more important thing is to cut down the adhesions. The thing to do will be to graft down a bone in there and give protection. That operation will be to incise the scar at the scalp wound and turn back healthy scalp and muscle and freshen up the edges of the bone, cut down the adhesions between the brain itself and the dura, and then take several pieces of bone from his leg and fit those over the defect in such a way that it will fill the defect in and put a layer of bone between the brain and the scalp to give him further protection from injury. The pieces of bone will be taken from the anterior portion of the tibia. The particular place

to cover is about two and one-half inches long.' Dr. Allen testified that in his opinion the patient will never be fit to perform the functions of an officer in the navy. 'Although he has made a very good recovery to date, I feel there may be further deterioration of his mental powers and also the possibility of epilepsy comes up. * * * I did not know the patient prior to the time of his accident but I would feel that his mental concentration is not as good as it was.'

"At the time of the accident the plaintiff was an officer in the navy, he was injured in line of duty and his medical bills were paid by the navy. He was receiving $273 per month, but in the following June his class was promoted, and at the time of the trial he was receiving $330 per month. His life expectancy is 32½ years. Instead of being promoted he is to be retired. When he is discharged from the hospital then his pay will be only $100 per month. Based on the pay of a senior grade lieutenant his actual financial loss is $89,700 without giving any consideration to the probability of further promotions with increasing base pay and allowances, nor to the fact that an officer's pay is automatically increased 5 per cent of the base pay for each three years of service up to 30 years.

"In support of their attack on the verdict, the defendants argue that the future damages are those only which 'are reasonably certain to result.' Silvester v. Scanlan, 136 Cal. App. 107, 111, 28 P (2d) 97. They then quote the experts. Dr. Fleming testified as to the future. Among other things, he said: 'Although he (the plaintiff) has made a very good recovery to date, I *feel* there

may be further deterioration of his mental powers and also the *possibility* of epilepsy comes up. I would think there is some mental deterioration that cannot be repaired. I did not know the patient prior to the time of his accident, but I would *feel* that his mental concentration is not as good as it was. Epilepsy is *likely* to follow a condition of this kind *quite often.* A man who has had a loss of brain substance and there has been damage to the brain caused by adhesions, it develops definite pressure on the brain and we know that oftentimes epilepsy follows.' The defendants emphasize the words which we have italicized and then they argue: '* * * No doctor essayed to testify that he would have epilepsy or any definite mental impairment, the only thing at all of this character being the above-mentioned speculation that he might.' But none of the evidence quoted was objected to. No ruling was asked of or made by the trial court. Defendants introduced no evidence rebutting the above excerpts. Under these circumstances we think the provisions of section 3283 of the Civil Code were complied with."

11. In *Marland Refining Co. v. McClung,* 226 Pac. 312; 102 Okl. 56, the Supreme Court of Oklahoma, decided in 1924, another very similar case involving a skull fracture, apparently without actual injury to the brain itself and an injury involving no removal of brain substance, where the Court awarded the plaintiff the sum of $25,000.00 and where on appeal it was argued that the verdict was excessive, and the Appellate Court upheld the verdict saying:

"It is contended that the verdict of the jury is excessive. The plaintiff was a young man 26 years of age at the time of the accident and employed by the Larrance Tank Corporation as its superintendent, earning $43.20 per week. He had been following his occupation of sheet metal worker for 8 years, having served 3 years as an apprentice and having worked continuously at his trade, with the exception of about 10 months' time, when he was in the army. It is undisputed the plaintiff received a 'basal fracture', that is, a fracture of the skull beginning at the base of the skull to the rear and left extending to the top of the skull. There is evidence in the record that the injury is permanent; that defendant in error is practically incapacitated for work of any kind. There is evidence that the injury such as received by the defendant may result in death, or epilepsy or insanity. There is evidence that the plaintiff cannot look up without wanting to fall, or close his eyes without wanting to fall. There is evidence that plaintiff suffers pain from headache and dizziness, and this continued every day up to the time of the trial. The injury occurred upon Thursday, and the plaintiff was unconscious until Sunday. That he bled from his ears and his hearing was affected. As to whether the injury to his ears is permanent or not, there is evidence that his hearing and eyesight are both practically normal. There is evidence he cannot read more than 30 minutes at a time without suffering pain. There is evidence that since the accident the plaintiff is apathetic and does not always recognize his friends, but appears sullen and unlike his former self.

"The case was tried about 10 months after the injury, and the plaintiff's condition was not improving, except as to his hearing, and regarding his eyes. The parties both cite numerous cases regarding the amount of the verdict. This court has discussed the question of excessive verdicts in numerous cases, to-wit: Slick Oil Co. v. Coffey, 72 Okl. ....., 177 Pac. 915; City of Sapulpa v. Deason, 81 Okl. 51, 196 Pac. 544; C.R.I. & P. Ry. Co. v. Fontron Loan & Trust Co., 89 Okl. 87, 214 Pac. 172; Okl. Prod. & Ref. Corporation of America v. Freeman, 88 Okl. 166, 212 Pac. 742; Sapulpa Electrical Interurban Co. v. Broome (Okl. Sup.) 219 Pac. 289.

"The verdict in the instant case is very substantial. The defendant concedes that plaintiff has received a very severe injury to the extent of suggesting that the verdict should not exceed the sum of $15,000. The defendant concedes that plaintiff is no doubt disqualified from doing any scaffolding work and possibly cannot do any work that involves severe jarring or severe physical exertion. It is conceded that plaintiff had done nothing from the date of the accident to the time of the trial that required any physical exertion, but merely assisted around the house. It is conceded, and one of the doctors, at least, testified, that the vertigo or dizziness is probably permanent. The defendant, however, suggests that there are avenues of work for which the plaintiff will not be disqualified. It is true that a person might receive many injuries that would disqualify him from doing one class of work that would not disqualify him from doing another. Here we have

a person who has received a fractured skull, and the brain is impaired and affected to some extent, and there is evidence that this injury is permanent. The plaintiff testified when he lies down and gets up that he is dizzy, and everything appears to be turning around, and when he reads 30 minutes his eyes hurt, and if he walks a little too far his head hurts. When these facts are considered, with the other facts heretofore stated, we think the permanency of the injury and the question of whether there is any vocation in life that plaintiff may follow are proper questions for the jury. The evidence in the record will support a finding that the plaintiff will be a constant sufferer the remaining days of his life, and the injury is such that he is and will be deprived of earning a livelihood, and the injury is of such a nature that he is liable to be afflicted with epilepsy or insanity. When these facts are considered in connection with the law as announced in the prior decisions of this court heretofore cited, we do not think it can be said that the verdict is so excessive as to justify this court in disturbing the same."

12. *Miller et al. v. Tennis,* 282 Pac. 345, 140 Okl. 185, the Supreme Court of Oklahoma, decided in 1929, was a case of compound skull fracture of the frontal portion, where a verdict of $30,000.00 was held not excessive, the court referring to *Marland Refining Co. v. McClung, supra.* Plaintiff was a minor with an expectancy of 44.85 years and was capable of earning $100.00 per month.

13. See also *Figlar v. Gordon,* 53 A. (2d) 645, 133 Conn. 577, decided in 1947, where a $30,000.00 verdict was held not excessive and "her primary injuries consisted of a compound comminuted depressed fracture of the skull with laceration of the brain and destruction of much brain tissue and a badly comminuted fracture of the right tibia and fibula". The Court in that case further stating, at page 648:

> "A year after the accident she still walked with a limp and at the time of trial had a 10 per cent loss of use of her lower leg. She still had a soft spot where the portion of skull was removed which may require an operation later for the insertion of a plate. Without this, danger of harm from a blow in that area will continue. At the time of trial she had been unable to resume her work and was still nervous, and irritable and suffered from disturbed sleep. The danger that epilepsy may develop during the next 10 to 15 years cannot be ruled out. While the evidence would not justify an award of damages based upon the occurrence of epilepsy in the future because it went no further than to deal with this as a possible result, the danger that it might ensue was a present fact and the jury were entitled to take into consideration anxiety resulting therefrom. Orlo v. Connecticut Co., supra, 128 Conn. at page 236, 21 A. 2d 402. In addition to the intense suffering already endured she will continue to have pain. Her loss of wages to the time of trial totalled $2,624 and her expenses for medical treatment amounted to $1,759.50, establishing special damages of $4,383.50."

14. In *Elder v. Chicago R. J. & P. Ry. Co.,* 204 N. W. 557, Supreme Court of Minnesota, 1925, affirmed by the United States Supreme Court, in 270 U. S. 611, the Court stated, at page 558:

> "The defendant insists that the verdict, which was for $29,940, is excessive. Plaintiff was 38 years old. He earned from $240 to $250 per month. He was badly burned, some ribs were broken, he suffered a concussion of the brain and was unconscious for a few days. There was an injury to the spinal cord. There is testimony that he will never be able to do manual work again, at least heavy work. He is deformed and still suffers".
>
> "The verdict is not excessive. Injuries are usually not quite alike nor are other elements entering into a proper award of damages, such as age, life expectancy, earning capacity, pain, and suffering, from the combination of which the award must be estimated in a sensible way, just the same. Damages awarded and sustained in other cases are of value for illustration but usually not at all controlling. * * *"

15. *The present marked increase in cost of living and the small purchasing power of money must be considered in determining whether the judgment was excessive or not.*

Annotation 46 A.L.R. 1230. At page 1234, *Hurst v. Chicago B. & Q. R. Co.* (1920), 280 Mo. 566, 10 A.L.R. 174, 219 S. W. 566, is cited as well stating the doctrine as follows:

"Compensation means compensation in value. It will not do to say that the same amount of money affords the same compensation when money is cheap as when money is dear. The value of money lies not in what it is, but in what it will buy. So follows that if $10,000 were fair compensation in value for such injuries as are here involved twenty years ago, when money was dear and its purchasing power was great, a larger sum will now be required when money is cheap and its purchasing power is small. How much larger will depend upon the difference in value (that is, in purchasing power) of money now and then. That money today has much less purchasing power than it had twenty, or even ten, years ago, admits of no dispute, and we are not justified in disclaiming judicial knowledge of a world wide condition seen and known of all men everywhere. If that be true, then if we today allow the same amounts in money that we allowed in like instances ten or twenty years ago, we are following our decisions of that day in letter, but departing from them in spirit. We are warned, upon excellent authority, that 'the letter killeth, but the spirit giveth life'. 2 Corinthians, iii, 6."

Also *Sherrill v. Olympic Ice Cream Co.* (1925), 135 Wash. 99, 237 Pac. 14 states:

"The old cases are only of relative value, because economical conditions today are not the same as they were ten or fifteen or more years ago".

Cases herein cited by appellee, supra, involving very similar injuries, in support of his contention that the judgment is not excessive, were decided during years as follows:

McDonald v. Standard Engine Co.	$100,000.00—1935
Marland Refining Co. v. McClung	$ 25,000.00—1924
Miller v. Tennis	$ 30,000.00—1929
Figler v. Gordon	$ 30,000.00—1947
Elder v. Chicago Ry. Co.	$ 29,940.00—1925

16. *The trial Court's decision will be upheld unless clearly and outrageously excessive.*

> "Upon appeal the decision of the trial court and jury on the subject cannot be set aside unless the verdict is 'so plainly and outrageously excessive as to suggest, at first blush, passion and prejudice or corruption on the part of the jury' ". Mudrick v. Market Street Ry. Co., 81 P. 2d 950 (quotation from page 956).

17. *Mere provocation cannot be shown in mitigation of compensatory damages.*

Horky v. Schroll, 26 N. W. (2d) 396; in that case, an action for assault and battery and for the recovery of damages, the Court at page 398 reviewed the authorities on this subject and concluded at page 399:

> "We conclude that the trial court properly refused to permit defendants to plead and prove provocation in mitigation of compensatory damages, as proposed by them".

The entire record of this proceeding, both civil and criminal, shows little or no evidence of provocation on the part of appellee, but assuming that it did, it would not affect the question of damages. The matter of appellant's point to the effect that there is considerable evidence in the record that appellee provoked the altercation and voluntarily entered into a fist fight

with appellant is adequately considered in the brief for the appellee in Case No. 11545 filed in this Court by the United States Attorney, Anchorage, Alaska, at pages 1, 2, 7, 8 and 9 thereof. The jury in the criminal case did not so conclude, nor did the trial Court in this civil proceedings. Furthermore, we do not believe that this matter has been properly submitted to this Court as error.

CONCLUSION.

In summarizing, appellee submits:

1. From the foregoing it appears that none of the points raised by appellant, or indeed all of them together, constitute error in this trial without jury. This is a clear case of an aggravated and unjustified assault culminating in extreme and permanent injuries to appellee.

2. The record in this case adequately and entirely supports the trial Court's findings and judgment for the reasons set forth in the foregoing brief for appellee.

We request that the judgment be affirmed.

Dated at Anchorage, Alaska, this 21st day of September, 1948.

Respectfully submitted,

HELLENTHAL & HELLENTHAL,

By JOHN S. HELLENTHAL,

Of Attorneys for Appellee.

Certificate of Counsel

I, John S. Hellenthal, of Attorneys for Appellee, hereby certify that I have prepared the original brief for appellee in this cause and that the above and foregoing copy of said brief for appellee is a true, full and correct copy of the original brief for appellee, as prepared by me.

Dated at Anchorage, Alaska, this 21st day of September, 1948.

John S. Hellenthal,
Of Attorneys for Appellee.